

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ALLSTATE INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
DAVID SCOTT GITTINGS, deceased, by and)
)
through MARY L. COOKE and LINDEN P.)
)
GITTINGS, the natural parents and Special Co-)
)
Administrators of the Estate of DAVID SCOTT)
)
GITTINGS, and NICHOLAS S. MARIANI, an)
)
individual,)
)
Defendants.)
_____)

Case No.: 2:07-cv-1468-RLH-LRL

ORDER

(Motion for Summary Judgment #15;
Counter-motion for Summary
Judgment #19)

Before the Court is Plaintiff Allstate Insurance Company's ("Allstate") **Motion for Summary Judgment** (#15), filed June 16, 2008. The Court has also considered Defendants Mary L. Cooke ("Cooke") and Linden P. Gittings' ("Linden Gittings") **Opposition** (#18), filed July 2, 2008, and Allstate's **Reply** (#21), filed July 9, 2008.

Also before the Court is Cooke and Linden Gittings' **Counter-motion for Summary Judgment** (#19), filed July 7, 2008, and Allstate's **Opposition** (#22), filed July 16, 2008. To date, no Reply has been filed.

BACKGROUND

In the early morning hours of July 31, 2005, David Gittings (“Gittings”), Nicholas Mariani (“Mariani”), Brian Kendall (“Kendall”), Tammy Caudell (“Caudell”), and Autumn Isi (“Isi”) were traveling in Gittings’ Jeep hunting jackrabbits near Searchlight, Nevada. Gittings was driving and Mariani was sitting in the front passenger seat with a loaded shotgun resting between his legs. While driving through the desert, Gittings spotted a rabbit and stopped the vehicle to pursue the rabbit on foot. Gittings and Kendall got out of the Jeep, while Mariani, Caudell, and Isi remained in the vehicle. When Gittings left the vehicle, Mariani moved the loaded shotgun from between his legs and placed it on the driver’s seat of the Jeep. A short time later, Gittings and Kendall returned to the vehicle. As Gittings climbed back into the vehicle, Mariani picked up his shotgun so Gittings would not sit on the gun. While moving the gun, Mariani brought the barrel of it across Gittings’ body and accidentally fired a shot that hit Gittings in the back of the neck and head, killing him.

The State of Nevada brought second-degree murder charges against Mariani. However, on August 8, 2005, Mariani pled guilty to involuntary manslaughter and other criminal charges. Mariani received a suspended sentence requiring two years of community service and restitution to the Gittings’ family.

At all relevant times Mariani was insured under an Allstate Indemnity Deluxe Plus Homeowners Policy (“Policy”). Mariani’s Policy contains the following pertinent language: “[w]e do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person.” (Dkt. #15, Allstate’s Mot. Ex. B (“Policy”) 19.) Allstate filed the instant action for declaratory relief to determine whether its Policy covers Mariani for his potential liability and, thus, whether Allstate is obligated to defend and indemnify Mariani.

Allstate now moves the Court to grant its Motion for Summary Judgment, contending that the language of the Policy relieves it of any liability connected with Mariani’s

unintentional shooting of Gittings. Cooke and Linden Gittings, the parents and co-administrators of the estate of Gittings, disagree and have filed a Countermotion for Summary Judgment, asserting that Allstate is liable because the shooting was accidental and therefore the exclusionary language of the Policy does not apply. For the following reasons, the Court grants Allstate's Motion and denies Cooke and Linden Gittings' Countermotion.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the non-moving party, and a dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the non-moving party. *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1148 (D. Nev. 2005).

In response to a properly submitted summary judgment motion, the burden shifts to the opposing party to set forth specific facts showing that there is a genuine issue for trial. *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The non-moving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991).

When parties file countermotions for summary judgment, the court must consider each party's motion separately to determine whether any genuine issue of material fact exists and whether that party is entitled to a judgment under Rule 56. *W. Land Exch. Project v. U.S. Bureau of Land Mgmt.*, 315 F. Supp. 2d 1068, 1075 (D. Nev. 2004). "In making these determinations, the

1 court must evaluate the evidence offered in support of each cross-motion.” *Id.* (citing *Fair Hous.*
2 *Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136–37 (9th Cir. 2001)).

3 A federal court, sitting in diversity must construe insurance policies as the state
4 would if presented the same question. *Fortis Benefits Ins. Co. v. Johnson*, 966 F. Supp. 987,
5 989–990 (D. Nev. 1997). Under Nevada law, insurance policies are interpreted broadly to provide
6 the “greatest possible coverage to the insured.” *Capitol Indem. Corp. v. Wright*, 341 F. Supp. 2d
7 1152, 1156 (D. Nev. 2004). Additionally, any ambiguity in the insurance contract must be
8 interpreted in favor of the insured. *Id.* But, if the language is unambiguous, the court will not
9 increase the legal obligations of the insurer by rewriting contract provisions. *Senteney v. Fire Ins.*
10 *Exch.*, 707 P.2d 1149, 1150 (Nev. 1985). Lastly, in Nevada, “an action for declaratory relief
11 seeking the interpretation of an insurance policy generally presents a question of law that may be
12 determined on a motion for summary judgment.” *Ins. Corp. of Am. v. Rubin*, 818 P.2d 389, 390
13 (Nev. 1991).

14 **II. Allstate’s Motion for Summary Judgment**

15 In order for Allstate to obtain declaratory relief in the instant manner, the injuries
16 Gittings sustained must either (1) not be covered under the Policy, or (2) if the injuries are
17 covered, the language of the Policy must unambiguously exclude coverage.

18 Here, the Policy covers the injuries Gittings sustained from the unintentional
19 shooting. The section of the Policy that subjects Allstate to potential liability states that “Allstate
20 will pay damages which an insured person becomes legally obligated to pay because of bodily
21 injury . . . arising from an occurrence.” (Policy 19.) The Policy defines “occurrence” as “an
22 accident . . . resulting in bodily injury.” (*Id.* at 3.) Under this unambiguous language, Allstate is
23 subjected to potential liability because the parties do not dispute that Mariani was an insured
24 person, or that the unintentional shooting was an accident.

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1 **A. The Scope of Allstate’s Homeowners Policy**

2 If the occurrence is excluded by a provision within the Policy, Allstate does not
3 have to provide coverage. The Policy specifically excludes coverage for “any bodily injury or
4 property damage intended by, or which may reasonably be expected to result from the intentional
5 or criminal acts or omissions of, any insured person.” (*Id.* at 19.)

6 There is no reported Nevada case interpreting the language of Allstate’s intentional
7 or criminal acts exclusion (“Exclusion”). Therefore, the Court uses its best judgment to predict
8 how the Supreme Court of Nevada would decide this issue, *see GMC v. Doupnik*, 1 F.3d 862, 865
9 (9th Cir. 1993), by using the well-reasoned decisions from other jurisdictions as guidance, *see In*
10 *re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990).

11 In the instant matter, Allstate argues that the language of the Exclusion is
12 unambiguous and, because Mariani was charged with a criminal act, the Exclusion automatically
13 applies to deny coverage. However, Cooke and Linden Gittings correctly assert that the Court
14 must engage a two-pronged test to determine whether the Exclusion is applicable. The occurrence
15 is not covered if (1) the insured acted either intentionally or criminally, and (2) the resulting
16 injuries were the intent or reasonably expected result of the insured’s intentional or criminal act.

17 *1. Intentional or Criminal Acts*

18 The language in the Exclusion unambiguously states that bodily injuries are not
19 covered if they “may reasonably be expected to result from the intentional or criminal acts . . . of,
20 any insured person.” (Policy 19.) Allstate is free, of course, to write a contract that excludes all
21 criminal acts, however, the instant Policy only excludes reasonably foreseeable harm from
22 criminal acts. The parties may disagree on the interpretation of the Exclusion, but that does not
23 mean that the language is ambiguous. *See Potter v. Ranger Ins. Co.*, 732 F.2d 742, 743 (9th Cir.
24 1984). This Court has interpreted an identical “intentional or criminal acts” exclusion and found
25 that the criminal acts in that case barred coverage. *See Allstate Ins. Co. v. Bruttig*, No. (2:05-cv-
26 1257-RCJ-PAL), 2006 WL 3248393, at *3 (D. Nev. Nov. 2, 2006). In *Bruttig*, a man assaulted

1 another man after the two got in a car accident. *Id.* at *1. The assaulted man suffered several
 2 injuries, including a broken hip. *Id.* The attacker was convicted of “Battery with Substantial
 3 Bodily Harm.” *Id.* The Court reasoned that the attacker’s intent did not matter, because the
 4 criminal offense was sufficient to trigger the exclusion. *Id.* at *3.

5 Allstate misinterprets *Bruttig* to argue that it is unnecessary to apply the reasonably
 6 expected standard to criminal acts. However if *any* criminal offense excluded coverage, as
 7 Allstate suggests, the modifying phrase “which may reasonably be expected to result from,” would
 8 be meaningless in relation to criminal acts. Moreover, the facts of *Bruttig* are much different than
 9 the facts of the instant case. In *Bruttig*, the attacker brutally and repeatedly struck the victim and
 10 was convicted of battery. Therefore, considering the brutal nature of the crime, the Court naturally
 11 reasoned that the criminal act alone excluded coverage. Notably however, *Bruttig* also applied the
 12 reasonably expected standard in analyzing the intentional nature of the attacker’s acts and held that
 13 “a reasonable person would expect [the victim’s] damages to result from [the attacker’s] violent
 14 behavior.” *Id.* at *4. Thus, *Bruttig* found the victim’s bodily injuries to be reasonably expected
 15 whether the attacker’s acts were criminal or intentional.

16 In the instant case, Mariani’s acts were unintentional and Mariani pled guilty to
 17 involuntary manslaughter. Even though acts can be criminal whether intentional or unintentional,
 18 *see, e.g., Allstate Ins. Co. v. Peasley*, 932 P.2d 1244, 1247 (Wash. 1997) (“criminal acts” includes
 19 intentional and unintentional acts), the intent of the crime is still helpful in determining whether
 20 bodily injury “may reasonably be expected to result” from the criminal acts of the insured.
 21 Therefore, the Court finds that the plain language of the Exclusion requires that any bodily injuries
 22 resulting from a criminal act must be reasonably expected. Accordingly, the Court addresses
 23 whether death may reasonably be expected from these criminal acts.

24 2. Reasonably Expected Results

25 Allstate urges the Court to apply an objective standard to what may reasonably be
 26 expected from Mariani’s criminal acts, while Cooke and Linden Gittings urge the Court to apply a

1 subjective standard. Several well-reasoned decisions from various jurisdictions, including this
 2 jurisdiction, have concluded that “intentional or criminal acts” exclusions should be evaluated
 3 under an objective standard. *See, e.g., Allstate Ins. Co. v. Brown*, 16 F.3d 222, 225–26 (7th Cir.
 4 1994) (criminal acts exclusion is unambiguous and provides an objective standard); *Allstate Ins.*
 5 *Co. v. Cruse*, 734 F. Supp. 1574, 1581 (M.D. Fla. 1989) (intentional or criminal acts exclusion
 6 requires an objective standard); *Allstate Ins. Co. v. S.L.*, 704 F. Supp. 1059, 1060 (S.D. Fla. 1989),
 7 *aff’d*, 896 F.2d 558 (11th Cir. 1990) (exclusion unambiguously requires a reasonable person
 8 standard); *Allstate Ins. Co. v. Travers*, 703 F. Supp. 911, 915 (N.D. Fla. 1988) (exclusion
 9 incorporates an objective test); *Bruttig*, 2006 WL 3248393, at *4; *Allstate Ins. Co. v. Foster*, 693
 10 F. Supp. 886, 888 (D. Nev. 1988) (exclusion is unambiguous and provides an objective standard);
 11 *Allstate Ins. Co. v. Sowers*, 776 P.2d 1322, 1323 (Or. Ct. App. 1989) (court objectively approaches
 12 exclusion’s reasonably expected standard). Thus, the Court applies an objective standard to
 13 determine whether death may reasonably be expected to result from Mariani’s acts.

14 Decisions in other jurisdictions are helpful in this regard. *See, e.g., Hooper v.*
 15 *Allstate Ins. Co.*, 571 So. 2d 1001, 1003 (Ala. 1990); *Peasley*, 932 P.2d at 1246. In *Hooper*, a man
 16 was drinking and handling a gun in preparation for a hunting trip. 571 So. 2d at 1002. While the
 17 man was handling the gun, it accidentally misfired, shooting his friend in the face. *Id.* The
 18 shooter pled guilty to second degree assault. *Id.* Evaluating an almost identical exclusion, *Hooper*
 19 held that the insured shooter was excluded from coverage because the victim’s injuries might
 20 reasonably be expected to result from the shooter’s unintentional criminal acts. *Id.* at 1003.

21 Similarly, in *Peasley*, a man shot a female guest in his home. 932 P.2d at 1246.
 22 The parties agreed that the shooting was accidental, however the local prosecutor brought charges
 23 after neighbors reported hearing the two arguing in the house just before the shooting. *Id.* The
 24 man eventually pled guilty to second degree reckless endangerment. *Id.* The man had an Allstate
 25 homeowners policy with language almost identical to the instant Policy. *Id.* at 1247. The *Peasley*

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1 court reasoned that by definition of the crime to which the man pled guilty, the injuries were
2 reasonably expected to result from the reckless act. *Id.* at 1250.

3 Accordingly, the Court finds that Gittings' injuries are a reasonably expected result
4 of Mariani's criminal act. Specifically, the injuries resulted from the criminal act of involuntary
5 manslaughter, brought about by unlawfully hunting rabbits in the desert, directing the shotgun
6 outside the motor vehicle without activating the safety, and discharging the shotgun inside the
7 vehicle. (Dkt. #15, Allstate's Mot. Ex. A-1 at 1-2.) Thus, the Court grants Allstate's Motion for
8 Summary Judgment.

9 **III. Cooke and Linden Gittings' Countermotion for Summary Judgment**

10 In their Countermotion for Summary Judgment, Cooke and Linden Gittings rely on
11 a subjective analysis of the Exclusion. Cooke and Linden Gittings cite *Allstate Ins. Co. v.*
12 *McCarn*, 683 N.W.2d 656 (Mich. 2004), for support. As previously explained, the Court rejects
13 the subjective analysis and follows the majority of jurisdictions which read the Exclusion to
14 unambiguously require an objective analysis. Thus, the Court denies Cooke and Linden Gittings'
15 Countermotion for Summary Judgment.

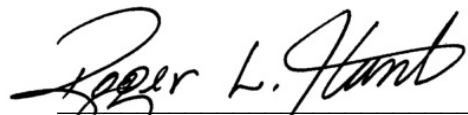
16 **CONCLUSION**

17 Accordingly, and for good cause appearing,

18 IT IS HEREBY ORDERED that Plaintiff Allstate's Motion for Summary Judgment
19 (#15) is GRANTED.

20 IT IS FURTHER ORDERED that Defendants Cooke and Linden Gittings'
21 Countermotion for Summary Judgment (#19) is DENIED.

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23 Dated: August 8, 2008.

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26 **ROGER L. HUNT**
Chief United States District Judge